OTTAVIO QUATTROCCHI

v.

MENTERI DALAM NEGERI MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[NO: R1-25-10-2001]
6 SEPTEMBER 2001

CIVIL PROCEDURE: *Parties - Addition of new party - Whether applicant 'a person directly affected' - Foreign fugitive applying for certiorari to quash extradition orders made by home minister - Application by foreign government to be added as party to certiorari proceedings - Whether foreign government 'directly affected' by outcome of certiorari proceedings - Rules of the High Court 1980, O. 53 r. 4(2) - Judicial review*

WORDS & PHRASES: *"persons directly affected" - Definition of - Rules of the High Court 1980, O. 53 r. 4(2) - Application for judicial review - Application for addition of new party*

The subject matter of this case concerned the extradition proceedings of a fugitive criminal of Indian nationality. Prior to the proceedings proper, the person sought to be extradited had obtained leave to apply for judicial review of the actions of the Home Minister and the magistrate leading to his arrest, and sought orders of *certiorari* to quash the special direction and the order of the Home Minister, and the warrant of apprehension of the magistrate. The instant application was by the Union of India to be included as a party to the judicial review proceedings.

Held:

[1] Order 53 r. 4(2) of the Rules of the High Court 1980 ('RHC') makes it mandatory that the notice of hearing and other related documents be served upon all persons directly affected by the application. Thus it followed that if the Union of India was regarded as a person directly affected, it would be entitled to be joined as a respondent in the judicial review. The phrase "directly affected by the application" must be construed to mean directly affected by the success of the application and not merely or solely by the fact or existence of the application or by what may transpire in the hearing of the application. By virtue of his role as a decision-maker the Minister had no interest in the outcome of the judicial review that needed his protection or preservation. If not for the requisition by the Union of India, the

Minister would have had no plausible interest to act against the applicant. The Union of India on the other hand had a genuine need to bring the applicant to justice for offences committed against persons she was bound to protect and defend against such wrongdoings. (pp 780 e & f, 781 a & c, 785 d-786 a-d)

[Application allowed.]

Case(s) referred to:
In re Salmon; Priest v. Uppleby [1889] 42 Ch D 351 ***(refd)***
Regina v. Liverpool City Council, ex p Muldoon [1996] 1 WLR 1103 ***(foll)***
Tomlin v. The Preliminary Investigation Committee of the Dental Council of Hong Kong [1995] 1 HKC 533 ***(refd)***

Legislation referred to:
Extradition Act 1992, ss. 3, 12(1), (3), 13(1)(a), 19
Rules of the High Court 1980, O. 53 rr. 3(2), 4(1), (2)

Other source(s) referred to:
Jones on Extradition, 1995, p 236

For the Union of India - Dr Cyrus V Das (Steven Thiruneelakandan & Sudharsanan Thillainathan); M/s Shook Lin & Bok
For the applicant - Cecil Abraham (Muhammad Shafee Abdullah, S Morgan, Gurmeet Kaur Sidhu & Raymond Low); M/s Shafee & Co
For the respondents - Abdul Karim Abdul Jalil SFC (Siti Zainab Omar & Farahanah Rabidin)

Reported by K Ganesh

JUDGMENT

Abdul Aziz Mohamad J:
On a request by the Union of India for the extradition of the applicant to India as a fugitive criminal, the Minister of Home Affairs gave a special direction under s. 3 of the Extradition Act 1992 that the Act shall apply to India in relation to the extradition thereto of the applicant, and, on a requisition by the Union of India under s. 12(1), also made an order under s. 12(3) authorising the Magistrate to issue a warrant for the apprehension of the applicant, which the Magistrate accordingly did under s. 13(1)(a). The applicant was duly apprehended and brought before the Sessions Court to face extradition proceedings under s. 19. He was released on bail. Before the extradition proceedings proper could commence, the applicant sought and obtained leave under O. 53 r. 3, of the Rules of the High Court 1980 to apply for judicial review of those acts of the Minister and of the Magistrate. He applied accordingly, seeking orders of *certiorari* to quash

the special direction and the order of the Minister and the warrant of apprehension of the Magistrate. His application has yet to be heard because, in the meantime, the Union of India made the present application to be added as a party to the judicial review proceedings.

Several grounds have been relied on as entitling the Union of India to be added as a party. The main ground relies on O. 53 r. 4(2). To aid understanding of r. 4(2), I need to say that r. 3(2) requires an application for leave to be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on, and r. 4(1) requires an applicant who has been granted leave to file a notice in Form IIIB, which is a notice of hearing of the substantive application.

Rule 4(2) provides as follows:

> Upon extraction of the sealed copy of Form IIIB the applicant shall serve a copy of the same together with a copy of the statement and all affidavits in support on all persons directly affected by the application not later than 14 days before the date of hearing specified in the said Form.

The use of the word "shall" makes it mandatory that the notice of hearing, the statement and the affidavits be served on "all persons directly affected" by the application.

I proceed on the basis that because a person directly affected is entitled as of right to be served with the notice of hearing and the relevant papers, he is entitled to be added as a party to the application. He has only to show that he is a person directly affected. If he can show that, he does not have to give reasons why he should be added as a party. I say that because that must be the purpose of making it mandatory that the papers be served on him – to enable him to be made a party if he so wishes. In *Regina v. Liverpool City Council, Ex parte Muldoon* [1996] 1 WLR 1103 *("Ex parte Muldoon")*, the Secretary of State applied for an order that he be joined as a respondent to applications for judicial review as being a person directly affected within the English O. 53 r. 5(3). See p. 1104, at bottom. If he had succeeded in showing that he was a person directly affected, I do not doubt that he would have been ordered to be joined. In *Tomlin v. The Preliminary Investigation Committee of the Dental Council of Hong Kong* [1995] 1 HKC 533 *("Tomlin")*, there was no dispute that the dentist was a person directly affected under O. 53 r. 5(3). The court said at p. 541B that if he so wished he could apply to be joined as a respondent. I take that to mean he had a right to be joined. He did not wish to be joined, though.

So if the Union of India are a person directly affected, they are entitled to be joined as a respondent in the judicial review. They need not give reasons why they need to be joined. The reason is in the very fact that they are directly affected by the application for judicial review. All that they need to show is that they are a person directly affected by the application. The phrase "directly affected by the application" must be construed to mean directly affected by the success of the application and not merely or solely by the fact or existence of the application or by what may transpire in the hearing of the application. For if the application were to fail, the position of the matter will remain as before, and no one will have been, in a substantive or material sense, affected by it.

I make that observation because when I asked Dato' Dr Cyrus Das for the Union of India to state in what way the Union of India contend that they will be directly affected by the application, he mentioned, besides the consequence that the extradition effort will come to an end should the application succeed, the fact that in the judicial review affidavits certain allegations have been made by the applicant against the Union of India.

But those allegations are allegations as to misrepresentations made by the Union of India in the making of the requisition under s. 12(1), and the allegations are made for the success of the application for judicial review, and if the Union of India need to counter the allegations it would be primarily to the end that the application should not succeed. They are not collateral allegations that the Union of India need to counter irrespective of the outcome of the judicial review, that is to say, that even though the applicant should succeed in his application, there is still an independent need to counter the allegations, although Dato' Cyrus did say that a country has a reputation to be protected in any case. So I am going to proceed on the basis that the Union of India's case is essentially or primarily that they will be directly affected in that if the applicant should succeed the extradition effort will come to an end.

As I said, if the Union of India are a person directly affected, they are entitled, by virtue of r. 4(2), to be joined as a party. It is, therefore, not a material question whether or not the Attorney General, as the present respondents' counsel, is capable of placing before or demonstrating to the court what the Union of India would want to place or demonstrate.

It is also, therefore, irrelevant whether or not the Union of India will be capable of playing any direct role in the extradition proceedings under the Act, which will go on should the applicant fail in his application. Encik Shafee for the applicant argued that under the Act the Union of India would not be able to have a direct role and that to allow them to be a party in

the judicial review would be tantamount to acting contrary to the intention and policy of the Act. But we are here concerned with judicial review governed by rules of court, which is outside the scope of the Act. If the rules governing judicial review entitle the Union of India to be a party, they have to be allowed to be a party. That they cannot be a party in proceedings under the Act is as it may be, but should not be used as a point on which to deny them the right to be a party in the judicial review.

So now I come to the crucial question whether the Union of India are a person directly affected by the applicant's application for judicial review. As I have indicated, the question in effect is whether the Union of India will be directly affected if the applicant should succeed in his application, that is succeed in bringing to an end the extradition effort.

The English provision that corresponds to our O. 53 r. 4(2), is O. 53 r. 5(3). By the English r. 5(3), the notice of motion or summons by which an application for judicial review is made "must be served on all persons directly affected".

In *Jones on Extradition* (1995), the learned author says at p. 236, without citing any authority, that in judicial review proceedings relating to extradition "all persons directly affected" in r. 5(3) is "a description which obviously includes ... the foreign government". It goes to show that to the learned author it is something obvious that the foreign government would be a person directly affected by the application for judicial review.

In *Tomlin, supra,* the decision of which judicial review was sought was that of the Investigation Committee of the Dental Council of Hong Kong. Their decision had been that there was no disciplinary case fit to go to the Dental Council on the applicant's complaint that a dentist had formed a relationship with the applicant's wife. After leave to apply for judicial review had been obtained, the notice of the application was served on the dentist as a person "directly affected" under O. 53 r. 5(3), and subsequently the dentist was made second respondent, the first respondent being the deciding authority, the Investigation Committee. The dentist, although not disputing that he was a person "directly affected" and that the papers were rightly served on him, applied to be removed as a named respondent in the title of the action.

In that case, if the applicant Tomlin had succeeded in his application it would have been by showing that the decision that he was challenging, namely the decision of the Investigation Committee, was wrong. The applicant would have succeeded in the judicial review in his fight against the Investigation Committee. The consequence of the successful outcome

of the judicial review would have been that efforts initiated by the applicant to get the dentist to be disciplined would still continue. In other words, the defeat of the Investigation Committee in the judicial review would have had adverse consequences on the dentist.

What is of significance in that case is that the dentist, who was legally represented, did not attempt to argue that he was not a person directly affected, much as he wished not to be joined as a respondent in the judicial review. He did not, for example, argue that the person directly affected by the judicial review would be the Investigation Committee and that, therefore, he would be only indirectly affected. He must have accepted, as something unarguable, that the adverse consequences on him of the successful outcome of the judicial review made him a person directly affected by the application for judicial review.

A case where there was a dispute as to whether a person is a person directly affected within the meaning of O. 53 r. 5(3), is *Ex parte Muldoon, supra*. It was a decision of the House of Lords. The decision of which judicial review was sought was that of a local authority, the Liverpool City Council, who had refused or failed to determine the claims of two persons to housing benefit under a statute. The two persons applied for judicial review. If the applications for judicial review were successful, the local authority would have to pay housing benefit to them. The Secretary of State, under a subsidy scheme for housing benefit set up under statute, would have to reimburse the local authority 95 per cent of what they paid the applicants. As stated at p. 1105F, he "will not have to pay housing benefit to the applicants either directly or through the agency of the local authority". Payment of housing benefit to the applicants would be the obligation of the local authority. The Secretary of State, however, applied to be joined as a respondent to the applications for judicial review as being a person directly affected within the meaning of O. 53 r. 5(3).

It seems to me that the local authority, in the context of the judicial review, had two roles. One was the role of a decision-maker. The other was the role of a person who would be affected if in the judicial review the applicants succeeded in having the decision of the local authority reviewed. The local authority would be affected because they would have to pay housing benefit to the applicants. Although the House of Lords did not say so, it seems to me that the person who would be directly affected by the success of the judicial review were the local authority in their second role. In that capacity they would be like the dentist in *Tomlin*. They would be directly affected not in the sense that in their first role as decision-maker

they have been shown to be wrong but because, in their second role, as a consequence of being shown to have decided wrongly in their first role, they would have to pay housing benefit to the applicants.

The crux of the House of Lord's decision is at p. 1105 E-G. Lord Keith of Kinkel accepted that in having to pay the subsidy to the local authority in consequence of the local authority having to pay housing benefit to the applicants, the Secretary of State "would inevitably or necessarily be affected" by the success of the judicial review, but held that he would "be only indirectly affected by reason of his collateral obligation to pay subsidy to the local authority". As to the principle by which that decision was reached, Lord Keith said this: "That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency". Applying that statement to the facts of the case, the House of Lords would have taken the "something" in the statement to be the establishing on the success of the judicial review that the local authority's decision was wrong, and would have asked the question by what means the Secretary of State would be affected by such outcome of the judicial review. They saw that he would be affected only by reason of the intervention of an intermediate agency, namely, the subsidy scheme. Therefore, the Secretary of State was not directly affected. My aim in saying all this is to point out that the intermediate agency in that principle that the House of Lords laid down does not refer to a person and has nothing to do with the concept of principal and agent. Agency there simply signifies a means, just as one would say, for example, that a seed is fertilised by the agency of insects.

The point may be better appreciated with the aid of something that was said in *In re Salmon; Priest v. Uppleby* [1889] 42 Ch. D 351, which Lord Keith said presented a certain analogy with *Ex parte Muldoon*. See p. 1106 B. The case concerned the words "directly affected", not in O. 53 r. 5(3), but in a rule that provided that notice of appeal must be served on all parties "directly affected". In that case the plaintiff, who had been unsuccessful against the defendant, appealed. The defendant had brought in third parties alleging that they had agreed to indemnify him. The question was whether the third parties were "directly affected" by the appeal and therefore had to be served with the notice of appeal. Fry LJ was of opinion that although the question whether the second defendant was liable to the plaintiffs affected the third parties, it did so "only through the intervention of the right of indemnity" and not directly. What I wish to point out is that the intermediate agency was the right of indemnity, just as in *Ex parte Muldoon* it was the subsidy scheme.

The point is important because in arguing that the Union of India were not a person directly affected by the judicial review within the meaning of our r. 4(2), Encik Shafee advanced the proposition, for the application of the principle in *Ex parte Muldoon*, that the intermediate agency would at least be the Minister, which I take to mean that if the applicant succeeded in the judicial review, that is succeeded in showing that the Minister was wrong, the Union of India would be affected only indirectly, because they would be affected only through the intermediate agency of the Minister. As I have endeavoured to show, the intermediate agency intended by *Ex parte Muldoon* is not a person or the decision-maker.

Encik Shafee also advanced the proposition, which I suppose is just another shade of the aforesaid proposition, that the person directly affected by the judicial review would be the Minister and therefore the Union of India could be only indirectly affected.

I do not think that the fact that there is one person directly affected means that any other person cannot be also directly affected but can only be indirectly affected. If the Minister is directly affected by the application it is because the application challenges his decision. But what is more important is that when r. 4(2) speaks of a person being directly affected by an application it must intend the deeper meaning of being affected by the success of the application. To succeed in the application in this case is to have the Minister's decision quashed. The proper question is, who would be affected if the Minister's decision were quashed? One must look to the consequence of it and see on whom it falls. In *Ex parte Muldoon*, as I have said, the local authority had two roles. The consequence of the judicial review of the decision they made in their capacity as decision-maker would fail on themselves in their capacity as provider of housing benefit. It was a case of a decision-maker having an interest in the outcome of the judicial review. In the present case, the Minister has only the role of decision-maker. He has no interest in the outcome of the judicial review that he needs to protect or preserve. The success of the judicial review would have the consequence that the applicant will be freed of the extradition proceedings. He will not have to be extradited to India. The Minister has no interest in the applicant. Were it not for the Union of India's requisition, the Minister would have had no interest to act against the applicant in respect of the offence or offences that the applicant is said to have committed in India. One might argue that having received the Union of India's requisition the Minister, as the representative of a sovereign state, has an interest in the success of international co-operation in the suppression and punishment of crimes, and that in that sense he is

directly affected by the failure of the co-operation as a result of the success of the judicial review, but I do not think that is the sense in which the words "directly affected" in the rule ought to be construed. In that sense the Minister cannot be said to be much more affected by the failure of the extradition effort than, for example, a judge who has convicted a person can be said to be affected by the setting aside of the conviction on appeal. The party that has a real interest in the success of the extradition effort is the Union of India. It is they who want to bring the applicant to justice because in their eyes he has committed an offence or offences affecting persons whom they are bound to protect and defend against wrongdoings. They are the only party who will be affected by the success of the judicial review and they will be affected directly. Even if the Minister were to be regarded as directly affected in the sense that I mentioned, the Union of India would nevertheless be directly affected too, because they will be affected not because of the intervention of an intermediate agency. And they will be affected in a degree that cannot be compared to the degree in which the Minister can be said to be affected in that sense. The pain will all be felt by the Union of India. The Minister will feel little.

A substantial part of the argument was devoted to the question of the need for the Union of India to take a direct part in the judicial review, a question which I have said is irrelevant if the Union of India can show that they will be directly affected by the application for judicial review because in that case, in my opinion, they will be entitled for that very reason to be made a respondent. Encik Shafee argued that the Union of India need not take part in the proceedings because the Attorney General, who represents the Minister, will be there to play their part. It is Encik Shafee's contention that in the judicial review the Minister acts as the agent or representative of the Union of India and that they are already before the court through the Minister and the Attorney General. Such a position taken as to the Minister's status in these judicial review proceedings is detrimental to the stand that the Union of India are not a person directly affected by the judicial review, and I say so because, in my view, if the Minister is the representative or agent of the Union of India, and if the Minister is to be regarded as directly affected, then the Union of India too would be directly affected as the principal. The Union of India would not be affected by reason of the intervention of an intermediate agency because, as I have said, the agency intended by *Ex parte Muldoon* is not a person and has nothing to do with the concept of principal and agent. But in a principal-and-agent kind of situation, what directly affects the agent would, in my opinion, directly affect the principal as well. I am encouraged in my opinion by a hint from *Ex parte Muldoon.* As I have pointed out, Lord

Keith was at pains to point out that if the applicants succeeded it would be the local authority that would have to pay the housing benefit to the applicants and not the Secretary of State. The Secretary of State "will not have to pay the housing benefit to the applicants directly or through the agency of the local authority". It was not in that way that the Secretary of State would be affected but only by reason of the subsidy scheme under which he would have to reimburse the local authority. So he was only indirectly affected. The hint that I get from the quoted words is that if the Secretary of State had to pay the housing benefit "through the agency of the local authority', that is if in paying the housing benefit the local authority did so as an agent of the Secretary of State, then the Secretary of State would be a person directly affected.

For the reasons that I have set out, I am of opinion that, for the purposes of O. 53 r. 4(2), the Union of India are a person directly affected by the application for judicial review, and that they are, therefore, entitled to be joined as a party. I therefore allow their application and I make the orders prayed for.